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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85-5731

WILLIE DAVIS BROWN, a/k/a
WILL BROWN,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF PETITIONER

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RESPONSE

The Petitioner in making but a brief reply to a certain glaring error in the Brief of the United States.

The Petitioner does not have the transcripts of the trial, as he was compelled to return them to the Clerk of the Court of Appeals after writing his brief, but since this Court has a copy of the record, Volume IV, pps. 20, 21 contain relevant material.

The United States, on Page 2 of its brief, recites:

> *"During the voir dire the prosecutor used one of his six preemptory challenges to excuse a black juror and one of his two alternate challenges to excuse a black alternate juror."*

This is error. There were no black alternate jurors, rather, the prosecutor used his challenges [including his last

challenge] to excuse the sole remaining black juror called. Then the Petitioner asked for further preemptory challenges [as he was out] in the hopes of sitting a black juror. This was denied.

It need be remembered that the remaining black jurors were excused by the Court for cause, which was also the subject of the appeal by Petitioner [See: POINT TWO of Petitioner's Appellate Brief hereto attached]; thus, the Petitioner had no black jurors upon his jury, in a manner the Petitioner would assert is in violation of constitutional guarantees as set forth in the Petition heretofore filed.

CONCLUSION

As before, the Petitioner prays that a Writ of Certiorari issue.

Respectfully submitted,

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BY: _____
FRED HADDAD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Petitioner has been furnished by mail to Honorable Charles Fried, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, this 15 January 1985.

BY: _____
FRED HADDAD

POINT TWO

THE APPELLANT WAS DENIED HIS RIGHT TO A JURY OF HIS PEERS BY THE EXCUSALS FOR CAUSE BY THE COURT AND/OR THE PRE-EMPTORY CHALLENGE EMPLOYED BY THE GOVERNMENT.

In recent years, more and more cases have evolved concerning the selection and composition of both grand juries and petit juries [See: ie, Hobly v. United States, ___ U.S.___, 104 S.Ct. 3093 (1984), and the cases cited therein].

The instant case presents a "variation on a theme". Appellant, Willie David Brown, is black; Co-Defendant, Sam Ponder, is black; the counsel for Brown is white, however, the counsel for Mr. Ponder was E. Melvin Porter, a member of long-standing in the Oklahoma State Senate, very well known, and also black.

Jury selection in this instance required two panels due to the number of challenges allowed, plus the number ordered for cause. Each panel contained a number of prospective jurors that were black. Indeed, several were called as prospective jurors, however, none served as they were excused either by the Court for cause, or by the prosecutor pre-emptorily.

Generally, obviously, one does not raise the issue that is being addressed presently, but due to certain occurrances at the trial, the same is mandated.

[The Appellant would note that he is still having the Court Reporter search her notes for further objections to

the Court's excusals for cause, for it is apparent from that transcribed, others were made (See: R. Vol. VI pp. 11, 12), and in fact the undersigned so remembers].

As noted, no black jurors served in this cause and each was excused; the second panel called contained three blacks, and after the prosecutor used his last pre-emptory challenge to strike the one black in the box (R. Vol. VI, pp. 20, 21), the Appellant then requested the Court to allow Appellant an additional "one or two challenges in an effort to see if we could seat some black jurors since there [were] several remaining black members of the community in the jury panel" (R. Vol. VI, p. 23). This was in conjunction with a particularized objection Appellant made to the prosecutor's selective use of its pre-emptory challenges to deny the Appellant a jury of his peers (R. Vol. VI, pp. 20, 21). At that time, the Appellant had no idea how prophetic those words would be and thus, will address firstly the prosecutor's challenge or challenges of black jurors.

During the second day of jury deliberation, 20 June, the trial court made known to the Appellants that he had earlier in the week [15 June] been advised that during the jury selection process and particularly after the exhaustion of the first panel, and while the Clerk was using the luncheon recess to find a second, the Assistant United States Attorney called to the Jury Clerk, Ms. Beatrice Slater, identified himself, asked if there were any blacks on the jury, and then said,

"Don't get any blacks in on it." [the new jury panel] (See: R. Vol. V, pp. 48 et seq.; Vol. VII, pp. 756, 767). The undersigned, as counsel for Appellant, when advised requested a hearing particularly because, inter alia, of the "challenges exercised during the initial jury selection of the initial panel and the objections raised by counsel to the exclusion of blacks both pre-emptorily and again, with due respect to the Court, on matters that we felt were not justiciable matters of cause" (R. Vol. V, p. 16; Vol. VII, p. 725). [NOTE: Mr. Richardson stated under oath that he excused two jurors that were blacks, one in the initial group which does not appear in the transcript, and one in the second group, Mrs. Doris Roberts, which does (R. Vol. VI, pp. 17-19)].

Mr. Richardson was sworn, and admitting calling the Clerk and asking the racial composition (R. Vol. VII, p. 728; R. Vol. V, pp. 19, 20) while denying what Ms. Slater said he said, did state that he said words close to "We would like to have as few black jurors as possible." (R. Vol. V, p. 70; R. Vol. VII, pp. 778, 779).

Mr. Richardson did, however, allow as to his reasons for excluding blacks, and that was because Mr. Porter "has a very special appeal to the black people in the community (R. Vol. V, p. 20; Vol VII, p. 728), and related his story of a State Court trial with Mr. Porter and its result, and then Mr. Richardson allowed that he took into consideration that the Defendants were black and that he planned on excusing

jurors acquainted with black defense counsel Porter (R. Vol. V, pp. 19, 20; R. Vol. VII, pp. 728, 729).

In examining Mr. Richardson, the following was established:

> *"MR. HADDAD: Would you agree that after the rather extensive voir dire that the Judge conducted on all jurors, that that black juror that you exercised your pre-emptory challenge on had stated that she could be fair, she would not be influenced by the fact of Senator Porter and so forth?*
>
> *MR. RICHARDSON: Yes sir, that's correct."*
>
> (R. Vol. V, p. 24; R. Vol. VII, pp. 732, 733).

There is no doubt that generally any party is free to employ their pre-emptory challenges in any manner they see fit [Compare: State v. Neil, 457 So.2d 481 (Fla. 1984), which, while not authority to this Court, treats a similar circumstance and outlines applicable law and holdings].

However, Appellant submits this is not an absolute and in the instant case, the prosecutor, it is submitted, employed his challenges in such a manner as to deny the Appellant his right to have a jury drawn from a representative cross section of the community.

The little law that the Appellant has been able to find that touches the issue present as to the prosecutor is

contained, parenthetically, in United States v. Green, 742 F.2d 609 (11 Cir. 1984), a case involving a different set of circumstances, to-wit: only white veniremen in a panel after two blacks had been excluded the previous evening having just concluded service upon a case involving the exact charge. The Court wrote:

> *"Green is not entitled to a jury which necessarily includes blacks merely because he is black.*"* Id. at 611.

The Court's asterisk refers the reader to the following language:

> *"On the other hand, Green may have the right not to have blacks systematically and intentionally excluded from the pool of prospective jurors in his case by prosecutors or other court officials motivated by a desire to place him at a disadvantage before the jury. Willis v. Zant, 720 F.2d 1212 (11 Cir. 1983). Furthermore, when the prosecutor employs its pre-emptory challenges to remove from jury participation all black jurors, the defendant's right to be tried by a jury drawn from a 'representative cross section of the community' may be effectively denied. This right is probably denied to the same extent it would have been had blacks not been included on the jury lists at all. See: Harris v. Texas, ___ U.S. ___, 104 S. Ct. 3556, 82 L.Ed.2d 858 (1984) (Marshall, J., dissenting) (citing Taylor v. Louisiana, 419 U.S. 522, 528, 95 S.Ct. 692, 695, 42 L.Ed.2d 690 (1975))."*

It is clear that Mr. Richardson's intent was to re-

move all black participation in the jury, and after the Court's excusal of certain blacks for cause, Mr. Richardson employed his pre-emptory challenges to excuse those the Court did not. His stated reasons have been set forth above, and this Court ought find that Appellant was denied his Sixth Amendment guarantees by the prosecutor.

Too, Appellant submits that the trial court erred in excusing juror Upchurch (R. Vol. VI, pp. 3, 4) who stated that she would not be influenced by Mr. Porter or the fact that the juror's mother grew up with Mr. Porter. The Court, rather, excluded the juror because she said it was possible that someone who knew her [the juror] might "fairly conclude that perhaps it is inappropriate for you to sit in a trial in which Mr. Porter is one of the lawyers" (R. Vol. VI, p. 4). Appellant suggests that same is neither inappropriate nor grounds for a sua sponte excusal for cause. And, the Court excused juror Rosales because Porter supported legislation that was beneficial to the juror, and the juror was therefore "supportive of him [Porter] in that respect" (R. Vol. VI, pp. 7, 8). Again, the Appellant suggests this was error, and the Court committed further error particularly in light of the above by not allowing Appellant his request for "one or two" additional challenges in an attempt to obtain some black representation on the jury.

It is submitted, therefore, that the Appellant was denied his Fifth and Sixth Amendment rights to due process

and a fair jury trial in this matter through the deliberate actions of the prosecutor, and what Appellant submits are erroneous rulings of the trial court.

A new trial ought be ordered at the least.